

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JIMMY F. McHENRY, PRO SE,	§	
TDCJ-CID No. 1811322	§	
Hutchinson County Jail SO No. 12253	§	
Previous TDCJ-CID No. 1060417	§	
	§	
Plaintiff,	§	
	§	
v.	§	2:12-CV-0205
	§	
MATT ARMSTRONG, Refinishing Systems,	§	
	§	
Defendant.	§	

FINDING OF FACT ON REMAND

The instant cause was remanded on May 10, 2013 to this Court for a determination of whether plaintiff delivered the notice of appeal in this cause for mailing to prison officials on or before January 10, 2013. Final judgment was entered November 9, 2012. Plaintiff's pro se notice of appeal is dated January 7, 2013; the envelope in which it was mailed is post-marked January 15, 2013; and it is file-stamped January 17, 2013.

On May 15, 2013, the Court issued an Order to Submit Documentation requiring the Attorney General, acting as Amicus Curiae, to produce the TDCJ-CID mail logs from each TDCJ institution in which plaintiff was incarcerated during the period of January 6, 2013 through January 17, 2013, showing the outgoing legal mail for January 6, 2013 through January 17, 2013, accompanied by a proper affidavit certifying the mail log as a regularly kept business record admissible into evidence as an exception to the Hearsay Rule.

Plaintiff was ordered to produce on or before May 29, 2013 to the Court his Affidavit along with any and all supporting documents or copies showing when he mailed his notice of appeal in the instant cause.

No responsive pleading has been filed by plaintiff, and he has presented no evidence concerning the date on which his Notice of Appeal was mailed.

On May 15, 2013, pursuant to the Court's Order, the Amicus Curiae filed a copy of the Boyd Unit Outgoing Legal Mail Log for the period from November 19, 2012 through December 4, 2013. On June 7, 2013, the Amicus Curiae filed a copy of the Segovia Unit Outgoing Legal Mail Log covering the period January 8, 2013 through January 17, 2013. At that same time, the Amicus Curiae also filed an Affidavit from the Administrative Assistant III/Mailroom at the Darrington Unit and an Affidavit from the Mailroom Supervisor at the McConnell Unit swearing that a search of the records revealed no records of any outgoing legal mail related to plaintiff JIMMY F. McHENRY, TDCJ-CID No. 1811322, for the period of November 1, 2012 through January 17, 2013.

Review of the Mail Logs and Affidavits presented by the Amicus Curiae shows plaintiff was incarcerated in the Segovia Unit during January 2013, when he filed his Notice of Appeal.

The Segovia Unit mail log shows only a single item of outgoing mail to the United States District Court for the Northern District of Texas, Amarillo Division, during the relevant period. Such mail was processed by the unit mail room and logged as follows: one item of special mail on January 15, 2013.

Review of the docket in the instant cause reveals nothing received by the Court which would correspond with the item logged and processed on January 15, 2013 except for plaintiff's Notice of Appeal, filed January 17, 2013.

Based upon all of the above, the Magistrate Judge makes the following **FINDING OF FACT** for presentation to the United States District Judge:

Plaintiff did not deliver the Notice of Appeal in this case to prison officials on or before

January 10, 2013. The evidence shows plaintiff deposited his Notice of Appeal into the internal mail system of the Segovia Unit on or about January 15, 2013.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Report and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 21st day of June, 2013.


CLINTON E. AVERITTE
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the “entered” date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the “entered” date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled “Objections to the Report and Recommendation.” Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party’s failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass’n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).